

# Some employment-related consequences of the adoption of the EU AI Act

The as-yet-unpublished new regulation on artificial intelligence aims to promote the use of systems based on said technology while ensuring health, safety and fundamental rights (including employment rights), an essential premise thereof being respect for Union and national law.

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**P**ending publication, a version of what will be the new regulation concerning the use of artificial intelligence (AI) in the European Union environment is available, one that harmonises legislation on AI and which, in an ambitious attempt, aims to promote the use of systems based on this technology while ensuring health, safety and fundamental rights. These rights include employment rights, albeit with a basic premise: respect for the protection of employment rights as set out in Union and national law.

### 1. **Employment rights guaranteed in Union law prevail**

The regulation starts from a basic premise, which is that, in the context of employment and protection of workers, the aforementioned regulation must not affect Union law on social policy and national labour law concerning employment and working conditions, including health and safety at work and the relationship between employers and workers. Nor shall it affect the exercise of fundamental rights as

recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States as well as the right to negotiate, to conclude and enforce collective agreements or to take collective action in accordance with national law. It should not affect national labour law for persons below the age of 18 or override the content of the UNCRC General Comment on children's rights in relation to the digital environment, insofar as not specific to AI systems, pursuing other legitimate public interest objectives (recital 9).

For this reason, Article 2(11) of the regulation states that it does not preclude the Union or Member States from maintaining or introducing laws, regulations or administrative provisions which are more favourable to workers in terms of protecting their rights in respect of the use of AI systems by employers, or from encouraging or allowing the application of collective agreements which are more favourable to workers.

## 2. AI and platform work

Nor should it affect the provisions aiming to improve working conditions in platform work laid down in the directive recently adopted by the European Parliament, pending publication. Moreover, the regulation aims to strengthen the effectiveness of such existing rights and remedies by establishing specific requirements and obligations, including in respect of transparency, technical documentation and record-keeping of AI systems.

## 3. AI as a high-risk system in the area of employment

The magnitude of the adverse consequences of an AI system makes it possible to classify it as

a high-risk system (recital 57). This is the case not only for actions that may alter fundamental rights, but specifically for AI systems that are used in employment, workers management and access to self-employment, in particular for the recruitment and selection of persons, for making decisions affecting terms of the work-related relationship, promotion and termination of work-related contractual relationships, for allocating tasks on the basis of individual behaviour, personal traits or characteristics and for monitoring or evaluation of persons in work-related contractual relationships, since those systems may have an appreciable impact on future career prospects, livelihoods of those persons and workers' rights. Work-related contractual relationships should, in a meaningful manner, involve employees and persons providing services through platforms.

Many fundamental rights may be adversely affected by the use of an AI system, which makes it necessary to classify it as high risk. Those rights include the right to human dignity, respect for private and family life, protection of personal data, freedom of expression and information, freedom of assembly and of association, the right to non-discrimination, the right to education, consumer protection, workers' rights, the rights of persons with disabilities, gender equality, intellectual property rights, the right to an effective remedy and to a fair trial, the right of defence and the presumption of innocence, and the right to good administration (recital 48). Indeed, throughout the recruitment process and in the evaluation, promotion, or retention of persons in work-related contractual relationships, such systems may perpetuate historical patterns of discrimination, for example against women, certain age groups, persons with disabilities, or persons of certain racial or ethnic origins or sexual orientation. AI systems used to monitor

the performance and behaviour of such persons may also undermine their fundamental rights to data protection and privacy.

Hence, the main content on this aspect is to be found in Annex III, which designates as high-risk AI systems, inter alia, those relating to employment, workers management and access to self-employment, and in particular refers to the following: (a) AI systems intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyse and filter job applications, and to evaluate candidates; and (b) AI systems intended to be used to make decisions affecting terms of work-related relationships, the promotion or termination of work-related contractual relationships, to allocate tasks based on individual behaviour or personal traits or characteristics or to monitor and evaluate the performance and behaviour of persons in such relationships. This classification shall also extend to systems that are used in education or vocational training.

#### 4. **Other areas, with a possible impact on employment matters, where AI systems are deemed high-risk**

Annex III also identifies as high-risk AI systems listed in the area of law enforcement, in so far as permitted under relevant Union or national law, where intended to be used: by or on behalf of law enforcement authorities, or by Union institutions, bodies, offices or agencies in support of law enforcement authorities or on their behalf to assess the risk of a natural person becoming the victim of criminal offences; by or on behalf of law enforcement authorities or by Union institutions, bodies, offices or agencies

in support of law enforcement authorities as polygraphs or similar tools; by or on behalf of law enforcement authorities, or by Union institutions, bodies, offices or agencies, in support of law enforcement authorities to evaluate the reliability of evidence in the course of the investigation or prosecution of criminal offences; by law enforcement authorities or on their behalf or by Union institutions, bodies, offices or agencies in support of law enforcement authorities for assessing the risk of a natural person offending or re-offending not solely on the basis of the profiling of natural persons, or to assess personality traits and characteristics or past criminal behaviour of natural persons or groups; and by or on behalf of law enforcement authorities or by Union institutions, bodies, offices or agencies in support of law enforcement authorities for the profiling of natural in the course of the detection, investigation or prosecution of criminal offences.

AI systems in the area of migration, asylum and border control management are also regarded as high risk, insofar as permitted by relevant Union or national law, where intended to be used by or on behalf of competent public authorities or by Union institutions, bodies, offices or agencies: as polygraphs or similar tools; to assess a risk, including a security risk, a risk of irregular migration, or a health risk, posed by a natural person who intends to enter or who has entered into the territory of a Member State; for the examination of applications for asylum, visa or residence permits and for associated complaints with regard to the eligibility of the natural persons applying for a status, including related assessments of the reliability of evidence; and for the purpose of detecting, recognising or identifying natural persons, with

the exception of the verification of travel documents.

Special attention is given to the administration of justice and democratic processes; thus, with reference to AI systems intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution or intended to be used for influencing the outcome of an election or referendum or the voting behaviour of natural persons in the exercise of their vote in elections or referenda. This does not include AI systems to the output of which natural persons are not directly exposed, such as tools used to organise, optimise or structure political campaigns from an administrative or logistical point of view.

Furthermore, the exercise of important procedural fundamental rights, such as the right to an effective remedy and to a fair trial as well as the right of defence and the presumption of innocence, could be hampered, in particular, where such AI systems are not sufficiently transparent, explainable and documented (recital 59).

#### **5. Obligation to inform and consult with workers' representatives**

This new regulation is without prejudice to obligations for employers to inform or to inform and consult workers or their representatives under Union or national law and practice, including Directive 2002/14/EC of the European Parliament and of the Council, on decisions to put into service or use AI systems. It remains ne-

cessary to ensure information of workers and their representatives on the planned deployment of high-risk AI systems at the workplace where the conditions for those information or information and consultation obligations in other legal instruments are not fulfilled. Moreover, such information right is ancillary and necessary to the objective of protecting fundamental rights that underlies this regulation. Therefore, an information requirement to that effect should be laid down without affecting any existing rights of workers (recital 92).

In this regard, Article 26(7), in setting out the obligations of deployers of high-risk AI systems,

states that, before putting into service or using a high-risk AI system at the workplace, deployers who are employers shall inform workers' representatives and

the affected workers that they will be subject to the use of the high-risk AI system. This information shall be provided, where applicable, in accordance with the rules and procedures laid down in Union and national law and practice on information of workers and their representatives.

#### **6. The use of AI for the granting and maintenance of welfare benefits**

Another area in which the use of AI systems deserves special consideration is the access to and enjoyment of certain essential private and public services and benefits necessary for people to fully participate in society or to improve one's standard of living. In particular, natural persons applying for or receiving essential public assistance benefits and services from public authorities namely healthcare services, social security benefits, social services providing protection in cases such as maternity, illness, in-

dustrial accidents, dependency or old age and loss of employment and social and housing assistance, are typically dependent on those benefits and services and in a vulnerable position in relation to the responsible authorities (recital 58).

The use of AI systems to determine whether authorities should grant, deny, reduce, revoke or reclaim such benefits and services will be classified as high risk. Thus, for example, determining whether beneficiaries are legitimately entitled to such benefits or services may have a significant impact on persons' livelihood and may infringe their fundamental rights, such as the right to social protection, non-discrimination, human dignity or an effective remedy and should therefore be classified as high-risk. Nonetheless, this regulation should not hamper the development and use of innovative approaches in the public administration, which would stand to benefit from a wider use of compliant and safe AI systems, provided that those systems do not entail a high risk to legal and natural persons.

Moreover, AI systems intended to be used for risk assessment and pricing in relation to natural persons for health and life insurance can also have a significant impact on persons' livelihood and if not duly designed, developed and used, can infringe their fundamental rights and can lead to serious consequences for people's life and health, including financial exclusion and discrimination. Finally, AI systems used to evaluate and classify emergency calls by natural persons or to dispatch or establish priority in the dispatching of emergency first response services, including by police, firefighters and medical aid, as well as of emergency healthcare

patient triage systems, should also be classified as high-risk since they make decisions in very critical situations for the life and health of persons and their property. In any case, high-risk AI systems should perform consistently throughout their lifecycle and meet an appropriate level of accuracy, robustness and cybersecurity, in light of their intended purpose and in accordance with the generally acknowledged state of the art (recital 74).

Here again, Annex III classifies as high risk the access to and enjoyment of essential private services and essential public services and benefits; in particular, it refers to AI systems intended to: be used by public authorities or on behalf of

### **Information for workers and their representatives on AI at the workplace shall be guaranteed**

public authorities to evaluate the eligibility of natural persons for essential public assistance benefits and services, including healthcare services, as well as to grant, reduce, revoke, or reclaim

such benefits and services; be used to evaluate the creditworthiness of natural persons or establish their credit score, with the exception of AI systems used for the purpose of detecting financial fraud; be used for risk assessment and pricing in relation to natural persons in the case of life and health insurance; and evaluate and classify emergency calls by natural persons or to be used to dispatch, or to establish priority in the dispatching of, emergency first response services, including by police, firefighters and medical aid, as well as of emergency healthcare patient triage systems.

#### **7. On data protection in the field of employment**

And, in principle, the fundamental right to data protection guaranteed by European legislation will continue to be covered by its own legisla-

tion, outside the content of this AI Regulation, to protect the private life and confidentiality of communications, including by way of providing conditions for any storing of personal and non-personal data in, and access from, terminal equipment. Those Union legal acts provide the basis for sustainable and responsible data processing, including where data sets include a mix of personal and non-personal data. Indeed, it is clarified that data subjects will continue to enjoy all the rights and guarantees awarded to them by such Union law, including the rights related to solely automated individual decision-making, including profiling. Harmonised rules for the placing on the market, the putting into service and the use of AI systems established under this regulation should facilitate the effective implementation and enable the exercise of the data subjects' rights and other remedies guaranteed under Union law on the protection of personal data and of other fundamental rights (recital 10). For this purpose, it should be clarified that privacy and data governance means that AI systems are developed and used in accordance with privacy and data protection rules, while processing data that meets high standards in terms of quality and integrity (recital 27).

#### **8. Concerns about the use of AI systems based on emotional states in situations related to work**

There are serious concerns about the scientific basis of AI systems aiming to identify or infer emotions, particularly as expression of emotions vary considerably across cultures and situations, and even within a single individual (see recital 44). Among the key shortcomings of such systems are the limited reliability, the lack of specificity and the limited generalisability. Therefore, AI systems identifying or inferring emotions or intentions of natural persons on the basis of their biometric data may lead to

discriminatory outcomes and can be intrusive to the rights and freedoms of the concerned persons.

Considering the imbalance of power in the context of work or education, combined with the intrusive nature of these systems, such systems could lead to detrimental or unfavourable treatment of certain natural persons or whole groups thereof. Therefore, the placing on the market, the putting into service, or the use of AI systems intended to be used to detect the emotional state of individuals in situations related to the workplace and education should be prohibited. That prohibition should not cover AI systems placed on the market strictly for medical or safety reasons, such as systems intended for therapeutical use.

#### **9. AI 'literacy' in the workplace**

The regulation considers the implementation of an AI literacy process to be essential (recital 20). In order to obtain the greatest benefits from AI systems while protecting fundamental rights, health and safety and to enable democratic control, AI literacy should equip providers, deployers and affected persons with the necessary notions to make informed decisions regarding AI systems. Those notions may vary with regard to the relevant context and can include understanding the correct application of technical elements during the AI system's development phase, the measures to be applied during its use, the suitable ways in which to interpret the AI system's output, and, in the case of affected persons, the knowledge necessary to understand how decisions taken with the assistance of AI will have an impact on them.

In the context of the application this regulation, AI literacy should provide all relevant actors in the AI value chain with the insights

required to ensure the appropriate compliance and its correct enforcement. Furthermore, the wide implementation of AI literacy measures and the introduction of appropriate follow-up actions could contribute to improving working conditions and ultimately sustain the consolidation, and innovation path of trustworthy AI in the Union. The European Artificial Intelligence Board (the 'Board') should support the Commission, to promote AI literacy tools, public awareness and understanding of the benefits, risks, safeguards, rights and obligations in relation to the use of AI systems. In co-operation with the relevant stakeholders, the

Commission and the Member States should facilitate the drawing up of voluntary codes of conduct to advance AI literacy among persons dealing with the development, operation and use of AI.

#### **10. And a desideratum**

That all stakeholders, including industry, academia, civil society and standardisation organisations, take into account, as appropriate, the ethical principles for the development of voluntary best practices and standards (recital 27).